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ACTION AT LAW BY A CREDITOR BENEFICIARY IN MARYLAND

*Mackubin v. Curtiss-Wright Corporation*¹

Defendant, a Delaware corporation, applied in writing to the New York Stock Exchange for a listing of its stock, and the Exchange accepted defendant's application. The consideration furnished by defendant was its promise, among other things, to inform promptly all stockholders by publication of any action concerning dividends on shares. Plaintiff, a stockholder in defendant corporation, placed an order with her broker to buy 100 additional shares of defendant's stock whenever its market price should decline to \$30.00 a share. Defendant's directors met in New York City, and determined late in the afternoon not to pay the usual quarterly dividend on the stock. Because of inexperienced personnel in defendant's New York office, the announcement of this decision was not made until 2:30 P. M. the next afternoon. Plaintiff's broker at 2:34 P. M. that afternoon purchased 100 shares of defendant's stock at \$30.00 per share for plaintiff—not knowing of the decision of defendant's directors. Immediately, after the failure to pay dividends became public knowledge, the stock plunged to as low as \$25.00 per share, and had never recovered to as high as \$30.00, prior to the filing of plaintiff's declaration. Plaintiff brought her action at law against defendant corporation for damages which she claimed accrued only because of defendant's failure to give prompt notice. In other words, plaintiff sued as a third party beneficiary of the agreement between defendant and the New York Stock Exchange. The Court of Appeals in affirming the trial court held that plaintiff could recover neither as a creditor beneficiary nor as a donee beneficiary—emphasizing the additional fact that plaintiff was claiming as a prospective purchaser under an agreement made exclusively to accommodate stockholders. It is obvious that plaintiff could not claim as a creditor beneficiary in this case since the Stock Exchange owed the plaintiff nothing.

However, some argument may be advanced to the effect that plaintiff may claim as a donee beneficiary,² for it

¹ 57 A. (2d) 318 (Md. 1948).

² *Ibid.*, 321: "A third person is a donee beneficiary where it appears that the purpose of the promisee in obtaining the promise of the performance thereof is to make a gift to the beneficiary or to confer upon him a right

seems reasonable to assume that the New York Stock Exchange would desire, as a matter of sound business practice, to protect prospective purchasers as well as actual purchasers from any dilatory tactics on the part of officers of corporations whose securities are listed on the "Big Board".

The noteworthy portion of the opinion, however, is the following *dictum* concerning the creditor beneficiary doctrine.³

"The Courts now generally recognize the right of a third party beneficiary to sue on a contract made expressly for the benefit of either a donee beneficiary or a creditor beneficiary. . . . A third person is a creditor beneficiary where no purpose to make a gift appears and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary, or a right of the beneficiary against the promisee which has been barred by the Statute of Limitations or by a discharge in bankruptcy or which is unenforceable because of the Statute of Frauds. 1 Restatement of Contracts, sec. 133. The great weight of American authority now recognizes that a direct right of action, either at law or in equity, arises from a contract promising performance for the benefit of either donee beneficiary or creditor beneficiary. 2 Williston on Contracts, 356."

From the above *dictum*, it would seem probable that Maryland is aligned with those jurisdictions which follow the so-called creditor beneficiary theory as set forth in the famous case of *Lawrence v. Fox*.⁴ In this case, A owed a debt to C. B and A agreed, that A would lend B a sum of money, if B would pay A's debt to C. Upon failure of B to pay C, C sued B in an action at law, and was allowed to recover by the New York court.

The above quoted *dictum* in agreement with at least two previous cases⁵ has permitted a creditor beneficiary to

against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary."

However, it is not necessary for the promisee to be the sole beneficiary; others may be benefited also.

There is no doubt that Maryland has adopted the donee beneficiary theory. See *Mackenzie v. Schorr*, 151 Md. 1, 133 A. 821 (1926); *Anderson v. Truitt*, 158 Md. 193, 148 A. 223 (1930).

³ *Ibid.*, 321.

⁴ 20 N. Y. 268 (1859).

⁵ *Small v. Schaefer*, 24 Md. 143 (1866); *Boulevard Corp. v. Stores Corp.*, 168 Md. 532, 178 A. 707 (1935).

sue at law, but neither of these cases, nor the principal case, has seen fit actually to cite *Lawrence v. Fox*.

In *Small v. Schaefer*,^{5a} the facts were very similar to those of *Lawrence v. Fox*. A had given C a bad check. For a consideration moving from A to B, B promised A to pay A's debt to C on the bad check. A fulfilled his part of the contract, and B refused to pay C. C sued B at law and was allowed to recover. It is interesting to note, however, that the court based its decision on what we now consider to be the donee beneficiary doctrine.⁶ A Massachusetts case was quoted which stated that, "When one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement."⁷ Manifestly, the court in *Small v. Schaefer*⁸ insists that, in accordance with the donee beneficiary theory, there must be some intent to benefit the donee. Some jurisdictions, furthermore, require in creditor beneficiary cases that there must be some intent to benefit the creditor or he cannot maintain an action.⁹ However, the more logical view is that no intent to benefit the creditor is necessary, that the creditor is subrogated to the rights of the debtor and may sue the new promisor.¹⁰

In the case of *Boulevard Corporation v. Stores Corporation*,¹¹ A owed C rent on a store; and, for consideration moving from A to B, B promised A to pay A's rent to C. C sued B in equity alleging fraud, which C failed to prove. The Court held, citing *Small v. Schaefer*,¹² but without mentioning either the creditor or donee beneficiary theory, that C had an adequate remedy at law, namely to sue A on his undertaking to pay the rent. Thus, although the facts of both of these cases are obviously similar to those of *Lawrence v. Fox*, the Court of Appeals failed to cite the New York decision in either one.

^{5a} *Ibid.*

⁶ *Supra*, n. 2.

⁷ *Carnegie v. Morrison*, 2 Metc. 381, 402 (Mass. 1841). As will be considered later in this note, Massachusetts has not accepted the creditor beneficiary theory of *Lawrence v. Fox*, although it does adopt the donee beneficiary doctrine.

⁸ *Supra*, n. 5.

⁹ II WILLISTON, CONTRACTS, Sec. 380.

¹⁰ At this point it should be made absolutely clear, and be remembered throughout this casenote, that the beneficiary has at no time lost his right to sue his original debtor, there having been no novation.

¹¹ *Supra*, n. 5.

¹² *Ibid.*

A small minority of jurisdictions led by Massachusetts has refused to follow *Lawrence v. Fox* and the creditor beneficiary theory. These states have, to a greater or lesser extent, adopted the English view, which insists that a third party beneficiary of a contract has no direct legal rights.¹³ There are statutory exceptions, and, unlike England, the creditor may sue in equity.¹⁴ Maryland, in *Hand v. Evans Marble Co.*,¹⁵ seems to follow the English view in a strong *dictum*^{15a} stating, "A man cannot incur liabilities, and, again, a man cannot acquire rights from a contract to which he is not a party."¹⁶ It would be difficult to find stronger language rejecting the *Lawrence v. Fox* doctrine, but since this is merely *dictum*, and other Maryland cases have decided to follow the doctrine, it is unlikely that the Court of Appeals will pay much heed to this portion of the *Evans* case. The language is sufficiently broad to reject the donee beneficiary doctrine which Maryland has unequivocally adopted in several cases.¹⁷

In the Maryland case of *Scherr v. Building and Loan Assn.*,¹⁸ for consideration flowing between A, the mortgagor, and B, the grantee of the mortgagor, B assumed A's mortgage debt to C. C moved for a deficiency decree against B. B covenanted with A, in addition to the assumption of the mortgage debt, to be liable to a deficiency decree, "to the same extent as though they had been the original mortgagors". Upon foreclosure, the proceeds of the sale were insufficient to pay the debt, and B demurred to the bill. The demurrer was overruled by the trial court; the Court of Appeals, however, reversed the order, and sustained B's demurrer. According to a local statute,¹⁹ a deficiency decree could be obtained only against parties suable at law on the covenants of a mortgage. The Court held in this case, that C, the mortgagee, could not maintain an action at law against B, the grantee, on the covenants between B and A, the mortgagor, because the agreement was made exclusively between A and B, and there was no privity of contract between C and B. Therefore, C's

¹³ II WILLISTON, CONTRACTS, Sec. 360, stated that the beneficiary in England probably has no equitable rights either. Certain other means have been provided for third party beneficiaries to realize on their claims, in cases such as insurance contracts, trusts, and others.

¹⁴ *Ibid.*, Sec. 387.

¹⁵ 88 Md. 226, 40 A. 899 (1898).

^{15a} Quoting ANSON, CONTRACTS, 197.

¹⁶ *Ibid.*, 229. There is a similar quotation on the same page from DICEY, PARTIES TO ACTIONS, 78.

¹⁷ *Supra*, n. 2.

¹⁸ 166 Md. 106, 170 A. 197 (1934).

¹⁹ Md. Code of Pub. Loc. L. (1930) Art. 4, Sec. 731 A.

motion for a deficiency decree was denied. Another point that seemed to cause difficulty to the Court was the rule that no one but a party to a sealed instrument can sue or be sued thereon. While it is true that the early common law denied the right of any person to sue or be sued on a sealed instrument, unless he was a party to the instrument, a statute enacted in 1914 changed this rule:

"In suits brought upon any instrument or writing under seal executed on and after June 1, 1914,²⁰ any persons entitled to sue or liable to be sued thereon but for such seal, shall be entitled to sue and liable to be sued notwithstanding such seal."²¹

With this statute in force for some time before the date of the mortgage, it is difficult to understand why the statute was not mentioned in the Court's opinion in order to allow C to maintain an action at law against B on the covenants.

Returning to the creditor beneficiary doctrine, and keeping the above statute in mind, we find that the Court, on the grounds that the covenants were not made to benefit the mortgagee, refused to accept the mortgagee's contention that a third party, for whose benefit a contract was made, could sue for its breach. This disposes of the donee beneficiary theory, it is true, but it seems that the facts of the *Scherr* case are similar to the New York decision as well as to the two Maryland cases heretofore discussed.²² Briefly, in the *Scherr* case, there was consideration flowing between B and A, wherein B promised A to pay A's mortgage debt to C. Yet the Court of Appeals failed to mention either the creditor beneficiary doctrine or *Lawrence v. Fox*. We must, therefore, conclude that such cases as the *Scherr* case stand as an exception to the rule as laid down in Maryland, for this case has been cited with approval in several later cases.²³ The guess may be hazarded, perhaps, that the decision will be limited to deficiency decrees in mortgage foreclosures under the local statute.

Finally, therefore, with the exception of the *Scherr* case and those later cases which cite it with approval, it seems that Maryland has unqualifiedly adopted the creditor beneficiary doctrine. The *dictum* in the principal case would seem to make our conclusion inescapable.

²⁰ The mortgage in the *Scherr* case was dated July 16, 1931. It was assigned on July 7, 1932.

²¹ Md. Code (1939) Art. 75, Sec. 15.

²² *Supra*, n. 5.

²³ *Mashkes v. Building and Loan Assn.*, 187 Md. 270, 173 A. 54 (1934); *County Trust Co. v. Harrington*, 168 Md. 101, 176 A. 639 (1935); *Safe Deposit and Trust Co. v. Strauff*, 171 Md. 305, 189 A. 195 (1937).